No. 91-122

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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PFZ PROPERTIES, INC.,

*Petitioner,*

v.

RENE ALBERTO RODRIGUEZ, *et al.*,

*Respondents.*

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

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## REPLY BRIEF OF PETITIONER

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## INTRODUCTION

Petitioner seeks this Court's confirmation of a limited right under the Due Process Clause of the Fourteenth Amendment. That right recognizes that a state may not deprive a person of the ability to make legitimate use of his land without having a rational basis for doing so. Respondents' opposition brief ("Respondents' Brief"), like the decisions below, declines to acknowledge the existence of such a protected right with respect to construction permits. This refusal cannot be reconciled with the prior decisions of this Court and is inconsistent with the view of the majority of the circuits.

### I. Facts Material to Question Presented

Respondents' Brief presents a number of factual arguments that depart from the allegations of and inferences

ascribed to the Amended Complaint by the courts below. These arguments either played no role in the decisions below or are disputed facts for the trial court, which are outside the scope of a motion to dismiss under FED. R. CIV. P. 12(b)(6). The factual allegations necessary to state a claim were set out in the Petitioner's Amended Complaint and the reasonable inferences that could be drawn therefrom.[1]

The facts essential to PFZ's substantive due process claim are as follows. PFZ purchased a large tract of land in Puerto Rico. It subsequently sought, and in 1976 received, approval from the Planning Board of Puerto Rico to develop this property.[2] The Superior Court of Puerto Rico affirmed

[1] The posture of this case is unusual in that the Amended Complaint was dismissed and the trial date vacated by the district court one week before trial, after the pretrial order was signed. (Respondents incorrectly state that the pretrial order was vacated. Respondents' Brief at 16). In this regard, it is well-settled under FED. R. CIV. P. 16(e), that the final pretrial order constitutes a pleading which enlarges the allegations of fact set forth in an amended complaint. *See generally* 6A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1522, at 220-23 & n.6 (1990) and numerous cases cited therein. *See also* FED. R. CIV. P. 16(e) advisory committee's note (*citing with approval, inter alia,* § 1522 of WRIGHT & MILLER).

The court of appeals' decision indicated that it had not considered the pretrial order, and Petitioner requested a rehearing on this basis. The request was denied on the ground that PFZ had not raised the issue in its initial briefs and, alternatively, that there was nothing in the pretrial order on PFZ's behalf which would have changed the First Circuit's decision. Nonetheless, in drawing reasonable inferences from the Amended Complaint, the courts below have had the pretrial order available to provide context.

[2] The Planning Board is responsible for the establishment of policy with respect to development and land use in Puerto Rico. *See PFZ Properties, Inc. v. Rodriguez,* 739 F. Supp. 67, 69 n.4 (D.P.R. 1990), *aff'd,* 928 F.2d 28 (1st Cir.), *cert. granted in part,* 112 S. Ct. 414 (1991), *citing* 23 L.P.R.A. § 62c. As alleged in the Amended Complaint, the land use approved by the Planning Board was a development consisting of several thousand hotel and residential units. Amended Complaint ¶ 9; JA at 132-33. The Resolution detailing the specifics of the approval and use is set forth at JA 13-35. *See also* n.4, *infra.*



the Board's approval of the requested land use in 1977 and the Supreme Court of Puerto Rico denied review of the Superior Court's favorable ruling.[3] It is reasonable to conclude from these allegations that the Commonwealth approved a legitimate use of PFZ's property.[4]

PFZ timely submitted development plans to the Regulations and Permits Authority of the Commonwealth of Puerto

[3] Amended Complaint ¶¶ 7, 9, 10; JA at 132-33.

[4] Respondents have not previously disputed, nor do they now dispute, that the Planning Board's 1976 approval was valid. Nothing in the record casts any doubt on that validity. Respondents' discussion of PFZ's efforts before the Planning Board from 1969 to 1976 is relevant only to demonstrate the length of time PFZ has pursued this project.

Notwithstanding any alleged authority on the part of the Governor or the Commonwealth to alter the Planning Board's determination, the record is devoid of any indication that such authority was in fact exercised. Similarly, no legislation has been enacted which would affect or relate to the claims herein.

Rico ("ARPE"),[5] as required by the Planning Board Resolution.[6] Those development plans were approved by formal ARPE resolution in 1981 as being consistent with the land use set forth in the Planning Board approval. Pursuant to the ARPE resolution, PFZ was authorized to submit construction drawings for site preparation.[7] As alleged in the Amended Complaint and recounted in the district court opinion below, "PFZ *timely submitted* to ARPE construction drawings for site improvements for the subdivision works of block 2 of the first section ('the [C]onstruction [D]rawings'),

[5] ARPE is a separate agency from the Planning Board. As set forth in the Amended Complaint, it reviews development plans and processes construction drawings for the purpose of issuing construction permits. Amended Complaint ¶¶ 4, 13, 16; JA at 132, 134. Prior to 1975, the Planning Board performed both its current functions and those of ARPE. When ARPE was created in 1975, the Puerto Rico legislature provided that, in carrying out its responsibilities, ARPE was to guarantee the "vested rights" of project proponents, which were acquired by virtue of Planning Board actions. *See* Regulations and Permits Administration Organic Act, June 24, 1975, No. 76, § 40(c) at 216; 23 L.P.R.A. § 71 (History).

In contrast to the Planning Board's discretionary policy responsibilities with respect to land use, *see* n.2, *supra*, ARPE's role is for the most part functional, *i.e.*, it implements Planning Board policy decisions. *See* 23 L.P.R.A. § 71d(r). For example, under current law and regulations, ARPE does not review construction drawings; it issues construction permits when the proponent's engineer certifies that the drawings are complete. 23 L.P.R.A. §§ 42a, 73-73c; Respondents' Brief at 11 n.17. The current rules evolved from the pre-certification procedures which were in effect when PFZ submitted its drawings and are illustrative of the functional nature of ARPE's permit-issuing responsibilities.

[6] Amended Complaint ¶ 12; JA at 133.

[7] Amended Complaint ¶ 16; JA at 134. The allegations in the Amended Complaint regarding ARPE's approval of PFZ's development plans also are not disputed by Respondents. Upon approval by ARPE, the development plans required no further approvals. *See generally* ARPE Manual of Procedures for Processing Construction Plans and Inscription Plans for Urbanizations ("Manual of Procedures"); JA at 1-12.



*as required by the 1976 Planning Board Resolution and the 1981 ARPE Resolution*" (emphasis added) (footnote omitted).[8]

ARPE refused to review the Construction Drawings submitted by PFZ.[9] Instead, it reviewed a different set of drawings[10] and used that review as a basis for dismissing PFZ's project, asserting that PFZ had never submitted the drawings required by the 1981 ARPE Resolution.[11] Respondents *have not disputed that they reviewed the wrong set of drawings* in

[8] *PFZ Properties, Inc. v. Rodriguez*, 739 F. Supp. at 69-70; JA at 481; Amended Complaint ¶ 16; JA at 134. Respondents' recitation of the facts ignores this language in the district court's opinion and the Amended Complaint. Moreover, Respondents not only dispute the facts alleged, they purport to conduct an evaluation of the merits of PFZ's Construction Drawings in their brief. This entire exercise is perplexing because Respondents have admitted that ARPE did not review the Construction Drawings submitted by PFZ. The "analysis" proffered thus played no role in Respondents reaching their decision to dismiss PFZ's project. *See* n.12 and accompanying text, *infra*. To the extent that the merits of PFZ's Construction Drawings pose any issue, it is one for the trier of fact.

[9] Amended Complaint ¶¶ 34, 36, 37; JA at 137. The Construction Drawings were filed in 1982, within the required one-year period, but were not acted on by ARPE for six years. These drawings are a set of "blueprints" submitted to obtain a construction permit. They bear the caption "Construction Drawings for Site Improvements."

[10] These are a set of drawings of an entirely different nature and purpose, which bear the caption "Preliminary Project Plans."

[11] Amended Complaint ¶¶ 31, 34-37, 40; JA at 136-38. *See also* the district court's discussion of PFZ's factual allegations in which the district court read PFZ's August 17, 1988 request for reconsideration as "unequivocally informing ARPE that it had reviewed the wrong drawings." *PFZ Properties, Inc. v. Rodriguez*, 739 F. Supp. at 70; JA at 484; Amended Complaint ¶ 35; JA at 137. Respondents have admitted in these proceedings that the wrong drawings (*i.e.*, the Preliminary Project Plans) were reviewed. *See* n.12 and accompanying text, *infra*. *See generally Pennell v. City of San Jose*, 485 U.S. 1, 7-8, 108 S. Ct. 849, 855-56 (1988) (the Court may consider uncontested statements made in the course of proceedings before it, which support the allegations in a contested complaint).

reaching the decision that the project would be dismissed, although they claim that such conduct was the product of a mistake.[12] PFZ's Amended Complaint alleged that Respondents' conduct was deliberate.[13]

Although Respondents dispute certain of PFZ's allegations (*e.g.*, whether they deliberately or mistakenly reviewed the wrong drawings), these disputes are ultimately a matter for factual determination by the jury. In the context of a motion to dismiss under FED. R. CIV. P. 12(b)(6), these factual issues must be resolved in Petitioner's favor (*e.g.*, it must be assumed that the Respondents deliberately refused to review PFZ's Construction Drawings). The deliberate review of the

[12] *See* Respondents' Brief in Opposition to PFZ's Petition for a Writ of Certiorari at 11 n.13. Respondents do not specifically discuss in their present Brief the August 2, 1988 dismissal complained of. Their decision to deny the project was the result of Respondents' refusal to review PFZ's Construction Drawings (Amended Complaint ¶¶ 31, 34, 36; JA at 136-37), and their decision instead to review the Preliminary Project Plans, which were returned with the dismissal letter. Amended Complaint ¶ 34; JA at 137.

Despite intimations in Respondents' Brief regarding environmental concerns regarding the project, any such concerns were addressed by the Planning Board and resolved in the Puerto Rico courts. *See* Amended Complaint ¶ 10; JA at 133. ARPE did not rely on environmental issues as a basis for its August 2, 1988 decision.

[13] Amended Complaint ¶¶ 36, 37; JA at 137. Respondents assert that PFZ did not allege that Respondents reviewed the wrong drawings as a "pretext." While PFZ did not specifically use the word "pretext" in the Amended Complaint, it alleged that the required drawings were submitted, that those drawings were not reviewed, that the decision to do so was deliberate and malicious, and that the decision was intended to deprive PFZ of its substantive rights in property. Construing all reasonable inferences in its favor, PFZ submits that a dismissal based on the deliberate review of the incorrect drawings could be characterized as a pretext for depriving PFZ of a permit.



wrong drawings cannot provide a rational basis for depriving PFZ of a permit for the legitimate use of its property.[14]

## II. Argument

The legal arguments advanced by the Respondents, as well as those relied on by the court of appeals below, necessarily turn on their refusal to acknowledge that the substantive component of the Due Process Clause protects a landowner's right to pursue the legitimate use of its property. Respondents and the amici continue to advance the proposition put forth by First Circuit decisions that, unless PFZ alleges deprivation of a fundamental right, it cannot state a substantive due process claim with respect to the denial of a permit relating to the use of its land.[15] In addition, they suggest that the availability of state remedies forecloses the existence of any substantive due process right, and that PFZ's claim is an unripe takings claim. These arguments overlook existing precedent and mischaracterize Petitioner's claims.

[14] PFZ has asserted that ARPE's "review" was motivated by personal and political purposes. *See* Amended Complaint ¶ 28; JA at 136, 468-72; Brief of Petitioner ("Petitioner's Brief") at 6-7. While this provides context and a motive for the arbitrary conduct, the act of deliberately refusing to review the Construction Drawings in order to deny PFZ's project in and of itself is sufficiently lacking in a rational basis to state a substantive due process claim.

[15] While Respondents dispute the existence of the protected right, they have not specifically argued that ARPE's alleged deliberate refusal to review PFZ's Construction Drawings could be rationally related to a legitimate state purpose.

Respondents have correctly set forth the issue upon which certiorari was granted. However, the Amicus Brief of the Council of State Governments has misstated it in terms of "unreasonable delay." While ARPE to this date has yet to process the actual Construction Drawings which were submitted, a decision nonetheless was made by ARPE. *See* Amended Complaint ¶¶ 31, 36; JA at 136-37.

A. PFZ Has Identified And Articulated A Substantive Due Process Right Which Is Applicable To Its Claims

The opposition briefs argue that PFZ has not been deprived of a protected property right under the substantive component of the Due Process Clause, notwithstanding PFZ's specific identification of such a protected right. The substantive due process right on which PFZ relies has been recognized and relied upon in numerous decisions of this Court and the lower courts, including the seminal land use decision, *Village of Euclid, Ohio v. Amber Realty Co.*, 272 U.S. 365 (1926).[16] *Euclid* involved a property owner's challenge to a zoning ordinance which was alleged to have imposed unreasonable restrictions on the use of his land. *Id.* at 386. The Court recognized that the allegations presented the issue of whether the ordinance violated the constitutional protection provided to the right of property in the landowner.

[16] As discussed in Petitioner's Brief at 14-21, this right has been recognized and relied upon in numerous additional Supreme Court and circuit court decisions. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264 (1977) (recognizing developer's right to be free of arbitrary or irrational zoning actions); *State of Washington, ex rel Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928) (due process protects the right of a landowner to devote its land to any legitimate use); *Nectow v. City of Cambridge*, 277 U.S. 183, 188-89 (1928) (Due Process Clause places substantive limits on a state's power to restrict a landowner's use of its property); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1409-10 (9th Cir. 1989) (substantive due process adequately alleged where plaintiffs claimed government interfered with right to use residential property for no legitimate reason); *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir.), *cert. denied*, 488 U.S. 851 (1988) (pertinent property interest implicitly assumed to be the property the plaintiff owns in substantive due process analysis of whether government action was arbitrary and capricious). *See also Polenz v. Parrott*, 883 F.2d 551, 556-57 (7th Cir. 1989) (landowner's property right in a substantive due process case often is assumed without discussion because it is the ownership interest in the land itself; the right to use one's property is "one of the bundle of rights attendant to ownership under the laws of property in all states").



*Id.* Although upholding the land use restriction in that case, the Court explained that it would have found the ordinance unconstitutional if it was arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare. *Id.* at 385.

The right was more explicitly articulated in *State of Washington, ex rel Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928). In that case, the Court stated that "[t]he right of [a landowner] to devote its land to any legitimate use is property within the protection of the Constitution". *Id.* at 121. The Court reached that conclusion in an action under the Due Process Clause of the Fourteenth Amendment. Moreover, the due process claims in *Roberge*, like those of PFZ, sought equitable relief to compel a state official to issue a building permit. *Id.* at 119.

Similarly, in *Nectow v. City of Cambridge*, 277 U.S. 183, 188-89 (1928), the Court found that the Due Process Clause placed substantive limits on the power of the state to interfere with the rights of a landowner by restricting the use of his property. The matter came before the Court on an appeal of a dismissal of a suit for a mandatory injunction directing the inspector of buildings to pass upon an application for a permit for the erection of buildings. *Id.* at 186. Relying upon *Euclid*, the Court found a substantive due process violation had occurred because the state action had no substantial relation to the public, health, morals, safety or welfare. *Id.* at 188. Although *Euclid*, *Nectow* and *Roberge* identify and address

the protected right asserted by PFZ and were discussed extensively in Petitioner's Brief, *Euclid* is mentioned only in passing and neither *Nectow* or *Roberge* is mentioned in Respondents' Brief.[17]

The Due Process Clause operates along a "rational continuum" which proscribes "substantial arbitrary impositions and purposeless restraints." *Moore v. City of East Cleveland, Ohio*, 431 U.S. at 502 (plurality opinion). The decisions cited by PFZ place the right of a landowner to use his property within the boundaries of that due process continuum. As Respondents note, fundamental rights under the Constitution also fall within that continuum, Respondents' Brief at 28-29, although at a different point. Thus, while PFZ is not asserting that its protected right is fundamental,[18] it does maintain that its right to pursue the legitimate use of its

[17] One of the amici suggests in a footnote that these decisions are no longer applicable in the substantive due process context in light of unspecified "more recent" cases. Amicus Brief of the Council of State Governments at 18 n.17. Notwithstanding that assertion, the decisions have not been criticized or limited by this Court, particularly insofar as they stand for the proposition that the right to devote one's land to a legitimate use falls within the protection of the Constitution. *Roberge* has been relied upon by this Court in the due process context, *see, e.g., City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 677-78 (1976), and has been cited recently by the Ninth Circuit for the proposition advanced by PFZ regarding protected property rights. *See Harris v. County of Riverside*, 904 F.2d 497, 503 (9th Cir. 1990). The continued precedential value of *Nectow* in the due process context similarly has been reaffirmed. *See, e.g., Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 499 n.6 (1977); *Polenz v. Parrott*, 883 F.2d at 556; *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d at 1407-08; *Bateson v. Geisse*, 857 F.2d 1300, 1305 (9th Cir. 1988).

[18] PFZ discussed fundamental rights in Petitioner's Brief in light of the First Circuit's apparent view that a party must allege a violation of a fundamental right to prevail in a substantive due process permit challenge. *See* Petitioner's Brief at 13-14 & n.17.



property free from conduct which has no rational basis should enjoy the protection of the Due Process Clause.[19]

Respondents also argue that PFZ's assertion of a protected right to the use of its land is somehow analogous to interests in governmental benefits or continued governmental employment which have been advanced as "property rights" in the procedural due process context. *See* Respondents' Brief at 18-19.[20] However, as this Court has more recently observed, the "right to build on one's own property — even though its exercise can be subjected to legitimate permitting requirements — cannot *remotely* be described as a 'governmental benefit.' " *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987) (emphasis added). Respondents simply fail to recognize that the right to make use of one's land, which is recognized by every state, is one of the most basic sticks in the bundle of property rights. *See Polenz v. Parrott*, 883 F.2d at 556.[21]

[19] PFZ also does not assert that the right to pursue a legitimate use of its land is a liberty interest. It simply notes that, in addressing the historic importance of property, the Supreme Court has acknowledged that, as a practical matter, liberty interests may have little meaning if one ignores the fundamental interdependence which exists between personal interest in liberty and personal interest in property. *See Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

[20] As noted in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), the Court has made clear that the property interests alleged in those decisions have been asserted in a context which extends "well beyond actual ownership of real estate." *Id.* at 572.

[21] Local governments only began enacting restrictions and requirements with respect to land use at the beginning of this century under the police power. *See discussion in Village of Euclid, Ohio v. Amber Realty Co.*, 272 U.S. at 386-87. However, the government's exercise of the police power in applying such restrictions is limited by the Due Process Clause. *Id.* The land uses recognized by Puerto Rico are those common to all local and state jurisdictions, *see generally* 23 L.P.R.A. §§ 62c, 62m, 62o, and include recreational, residential and commercial development. *Id.*

B. The Availability Of State Remedies Is Irrelevant To PFZ's Substantive Due Process Claim

Respondents also appear to argue that the Petitioner's substantive due process claim may be precluded by the availability of state remedies. Respondents' Brief at 24. This view contradicts well-established law reaffirmed recently in *Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975 (1990), in which this Court stated that a party may bring a Section 1983 action for deprivation of substantive due process rights regardless of the availability of state post-deprivation remedies.[22] *Id.* at 125, *citing generally Monroe v. Pape*, 365 U.S. 167 (1961), *overruled in part not relevant here, Monell v. Department of Social Services*, 436 U.S. 658, 664-89 (1978). *See also Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 957 (9th Cir. 1991) *(citing Zinermon* for the proposition that the availability of state remedies is irrelevant in the substantive due process context).

Respondents' arguments, and those of the amici, confuse the appropriateness of considering post-deprivation state remedies in certain procedural due process contexts with the irrelevance of such consideration in the substantive due process context. The distinction between the two is explained in *Zinermon*, 494 U.S. at 132-37, and is discussed in Petitioner's Brief at 26 n.36.

C. PFZ's Substantive Due Process Claim Is Not A Takings Claim And Does Not Present A Ripeness Issue

Respondents argue that PFZ's claims must be recast as takings claims and that those recast claims must be dismissed on ripeness grounds. Respondents' Brief at 35-36. This argument misconstrues both the nature of the conduct complained of by PFZ in its Amended Complaint and the prior

[22] Respondents appear to rely on two Seventh Circuit cases for their argument concerning the relevance of state remedies. Respondents' Brief at 24. Both decisions predate *Zinermon*.



decisions of this Court regarding the purpose and nature of the Takings Clause.

PFZ's substantive due process claim is distinct from a takings claim. The Amended Complaint is premised on allegations of misconduct by state officials. Moreover, as to the Commonwealth of Puerto Rico, PFZ seeks *only equitable relief, i.e.*, to compel the review of the drawings which ARPE improperly has refused to process so that PFZ may pursue its approved use.[23] As this Court explained in *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987), a basic understanding of the Takings Clause "makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of *otherwise proper interference* amounting to a taking". *Id.* at 315 (latter emphasis added). PFZ's substantive due process claim is premised on misconduct which cannot reasonably be construed to allege "proper government interference" with its property. Moreover, because it seeks

[23] Amended Complaint ¶ 41(c); JA at 139. As provided by 42 U.S.C. § 1983, PFZ seeks damages from Respondent Rodriguez in his *individual* capacity for his tortious conduct involved in the refusal to process the drawings. The Takings Clause, on its face, only has application when a party seeks compensation from the *state*, not damages from an *individual*.

equitable relief, not compensation, to remedy the misconduct, PFZ's claim cannot be characterized as a "taking" within the meaning of the Fifth Amendment.[24]

The takings ripeness analysis urged by opponents is inapposite in the substantive due process context. As this Court noted in *Zinermon v. Burch*, 494 U.S. at 125, 110 S. Ct. at 983, substantive due process violations actionable under Section 1983 are "complete when the wrongful action is taken." PFZ alleges actionable misconduct on the part of ARPE officials and seeks equitable relief under the Due Process Clause, which is not available under the Takings Clause. Moreover, Respondents' arguments ignore the fact that ARPE's refusal to process the Construction Drawings and dismissal of its project was a final decision. Reconsideration of the dismissal was denied by ARPE,[25] and the Puerto Rico courts declined to exercise their discretionary powers to review ARPE's decision.

Respondents suggest that PFZ could have gone to *another* agency, the Planning Board, and begun its development efforts anew, seeking the same land use approval by which it

[24] Respondents' suggestion would appear to raise public policy concerns which contradict certain of their other arguments. As they note, the Eleventh Amendment forecloses damage claims against the states. As such, in a proceeding against a state on a substantive due process claim, parties generally are limited to equitable relief. Equitable relief, such as that sought by PFZ, has far less impact on states than Section 1983 actions which seek "just compensation" under the Takings Clause. Moreover, given that substantive due process claims in this context will only be actionable where the deprivation of land use has no rational relationship to a legitimate objective, the resort to injunctive relief in well-founded cases will serve to promote productive uses of property rather than to deplete state treasuries.

[25] The request for reconsideration unequivocally advised ARPE that it had reviewed the wrong drawings. *See* n.11, *supra*. Nonetheless, Respondents reviewed the same drawings and denied reconsideration on that basis. *See* JA at 140-43.



acquired vested rights sixteen years ago.[26] Such action, however, would not address the conduct complained of. PFZ has never claimed that the Planning Board's action was inappropriate. Indeed, the essence of PFZ's case is its attempt to pursue the use approved by the Board in 1976. No matter how many approvals PFZ obtains from the Planning Board, those approvals will not provide the equitable relief necessary to compel ARPE to process PFZ's Construction Drawings as long as ARPE refuses to do so. PFZ already has submitted to the Respondents the Construction Drawings required to obtain a construction permit,[27] and Respondents have deliberately and knowingly refused to review those drawings. The Due Process Clause should be available to address their alleged arbitrary and irrational conduct through equitable relief.[28] The substantive due process claim alleged by PFZ was

[26] *See* n.5, *supra* (ARPE must guarantee protection of vested rights acquired by project proponents who obtain Planning Board approval).

[27] Respondents and the amici suggest at several junctures that PFZ did not submit construction drawings in a timely fashion. This is inconsistent with the Amended Complaint, and the facts and reasonable inferences drawn therefrom by the district court. *See* n.8 and accompanying text, *supra*. Moreover, it is a circular argument, inasmuch as it relies upon the very misconduct complained of. By deliberately reviewing the wrong drawings, ARPE "concluded" that no construction drawings had been submitted and that the deadline had been "missed" six years previously.

[28] Any argument that the action of ARPE was not "final" is contradicted by the availability of resort to the local courts, albeit for discretionary review. Respondents' suggestion that ARPE's dismissal is not final and thus not actionable is not only mistaken, but would provide ARPE every incentive to send PFZ back to the Planning Board repeatedly by simply refusing to review its drawings and dismissing its project. While arguing that ARPE's final decision does not present a ripe claim, Respondents and the amici conveniently refrain from specifying how many times ARPE must refuse to process PFZ's drawings before its decision ripens into an actionable claim. Furthermore, even if ripeness was an issue, the law should not require PFZ to do that which is repetitive or futile.

complete when its project was dismissed. *See Zinermon v. Burch*, 494 U.S. at 125, 110 S. Ct. at 983.[29]

### D. Recognition Of PFZ's Right To Use Its Land Free Of Irrational Government Conduct Does Not Trench Upon State Prerogatives Or Place An Undue Burden On The Courts

Finally, Petitioner's claim does not, as the opposition suggests, "threaten[ ] to transform into federal constitutional cases an entire genre of administrative land use disputes."

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[29] While the Respondents fail to cite any authority for their argument, the amici suggest that *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), stands for the proposition that PFZ's claims are not ripe. Reliance on *Williamson County* is misplaced. Its holding with respect to ripeness applies to regulatory takings, *see MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986), which are not at issue in this case. Moreover, in *Williamson County*, the Court specifically noted that substantive due process claims were not before it. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. at 182 n.4. Instead, it was presented with a regulatory takings claim premised on a challenged zoning ordinance under which a variance was available. The Court simply concluded that there was not a regulatory taking until the variance was denied. *Williamson County* is thus inapposite to the present case, which seeks equitable relief for individual acts of misconduct and has no quarrel with any regulation or zoning ordinance. PFZ has no dispute with the Planning Board's approval of its land use or with ARPE's approval of its development plan.

It should be noted that the plaintiffs in *Williamson County* also advanced a due process theory that the regulation went so far "that it had *the same effect as a taking by eminent domain.*" *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. at 197 (emphasis added). Noting that this issue was not before it, the Court suggested that, in such circumstances, the potential availability of a variance might affect ripeness; *i.e.*, if a variance were granted, no taking would have occurred. *Id.* at 199-200. In contrast, PFZ has not alleged that ARPE's actions amount to a taking by eminent domain, it has not challenged any zoning ordinance, and there is no "zoning variance" which would somehow provide an avenue for PFZ to obtain its permit. Thus, the dicta in *Williamson County* also has no bearing on PFZ's substantive due process claims.



Amicus Brief of the Council of State Governments at 21-22. Most challenges to alleged arbitrary action by administrative permitting agencies are based on claims that the agency has exceeded its authority or given undue weight to a particular concern — health, safety or the general welfare — in the permitting process. Such matters are the daily grist of the land use administrative mill and do not, in most instances, raise constitutional issues because, even if wrong, they are rationally related to proper governmental concerns.

Here, however, the facts pose quite a different matter. Petitioner has demonstrated that its proposed use was legitimate, based on Planning Board approval. It has alleged that Respondents deliberately reviewed an incorrect set of drawings to serve as the basis of ARPE's decision to dismiss PFZ's project. Such an action, which is unrelated to any legitimate governmental interest, cannot be a rational basis for the government to deny an owner the legitimate use of his land.

There is no evidence that correcting an occasional abuse would "make the Fourteenth Amendment a font of tort law." *Parratt v. Taylor*, 451 U.S. 527, 544 (1981). It hardly trivializes the Constitution to suggest that permitting authorities must base their decisions on grounds rationally related to a legitimate governmental purpose. Indeed, it is noteworthy that, although the right which Petitioner asserts has been recognized by this Court since as early as 1928, there has been no flood of petitions to the federal courts. *See* Petitioner's Brief at 21-23. This history suggests that most permitting bodies act rationally and from legitimate government concerns. A decision by this Court to allow Petitioner to correct a clear alleged abuse will not trench upon state prerogatives.

## CONCLUSION

The First Circuit's failure to recognize a substantive due process violation with respect to PFZ's protected right to pursue a legitimate use of its property, notwithstanding

facially sufficient allegations of arbitrary, capricious and illegal conduct, is inconsistent with the teachings of this Court and the majority of the other federal circuits. The Court should reverse the decision below, and remand this case for proceedings consistent with its decision.

Respectfully submitted,

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